

STATE OF MICHIGAN
COURT OF APPEALS

DAWN DeMARSE and TIMOTHY
WALENDZIK, as Personal Representatives of the
Estate of ANTHONY WALENDZIK,

Plaintiffs-Appellees/Cross-
Appellants,

v

CITY OF LANSING,

Defendant-Appellant,

and

CLINTON/EATON/INGHAM COMMUNITY
MENTAL HEALTH SERVICES, ROBERT
SHEEHAN, ANNA FISHER, and NATALIA
MARIA LITKEWYCZ,

Defendants/Cross-Appellees,

and

MICHAEL MURPHY and CRAIG STOTT,

Defendants.

DAWN DeMARSE and TIMOTHY
WALENDZIK, as Personal Representatives of the
Estate of ANTHONY WALENDZIK,

Plaintiffs-Appellees,

v

CLINTON/EATON/INGHAM COMMUNITY
MENTAL HEALTH SERVICES, ROBERT
SHEEHAN, and ANNA FISHER,

UNPUBLISHED
April 11, 2006

No. 258729
Ingham Circuit Court
LC No. 03-000465-NI

No. 259685
Ingham Circuit Court
LC No. 03-000465-NI

Defendants-Appellants,
and

CITY OF LANSING, MICHAEL MURPHY,
CRAIG STOTT, and NATALIA MARIA
LITKEWYCZ,

Defendants.

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

In Docket No. 258729, the city of Lansing (Lansing) appeals¹ from the trial court's denial of its motion for summary disposition under MCR 2.116(C)(7) and (10). Additionally, Dawn DeMarse and Timothy Walendzik appeal from the trial court's grant of summary disposition to Anna Fisher. In Docket No. 259685, Clinton/Eaton/Ingham Community Mental Health Services (CEI-CMH), Robert Sheehan, and Anna Fisher appeal from the trial court's denial of their motion for summary disposition under MCR 2.116(C)(7) and (10). In Docket No. 258729, we reverse the trial court's denial of summary disposition to Lansing and affirm the grant of summary disposition to Fisher. In Docket No. 259685, we reverse the trial court's denial of summary disposition to CEI-CMH, Sheehan, and Fisher.

I. Basic Facts

On April 6, 2001, at 6:45 p.m., Anthony Walendzik, the deceased, appeared in front of an East Lansing Parking and Code Enforcement Division vehicle (PACE vehicle) looking distraught and asked the driver for a ride to a homeless shelter or a police station. He explained that he was traveling on a Greyhound bus from Detroit to Grand Rapids but left the bus because he feared people on the bus were trying to kill him. The deceased subsequently agreed to be transported to CEI-CMH to talk to a mental health expert.

Once at CEI-CMH, Anna Fisher, a mental health therapist, interviewed the deceased and determined that he needed to be seen by a doctor in order to ascertain his mental condition. However, the only doctor on staff that night was busy evaluating an elderly person possibly suffering from dementia. While Fisher was not a doctor, she concluded that the deceased was delusional, but not suicidal; therefore, she did not order the security guards to restrain the deceased while he waited to see the doctor.

¹ There is some dispute regarding whether certain of the appeals in these consolidated cases should legitimately be treated as having resulted from claims of appeal under MCR 7.202(6)(a)(v). Even if not, however, we would, under the circumstances of these cases, simply treat the claims of appeal as granted applications for leave to appeal.

While the deceased waited to see the doctor, he was allowed to step outside the building for smoking breaks, but during his last smoking break he walked away from the building. Michael Murphy, a CEI-CMH security guard, followed the deceased as he walked north toward Jolly Road and then down the sidewalk on the south side of Jolly. Murphy yelled to the deceased to return to the building, and the deceased responded by turning around and walking back toward Murphy. Murphy turned away from the deceased and then heard the sirens of an ambulance approaching on the westbound side of the street. Murphy did not see the deceased run into the street, but he turned toward the street in time to see the deceased being thrown down the street and to see the ambulance slow down, partially in the eastbound lane. The deceased died as a result of being struck by the ambulance.

The Lansing Fire Department operated the ambulance that struck and killed the deceased. Natalia Litkewycz drove the ambulance, accompanied by Paul Colegrove. The lights and sirens of the ambulance were engaged at the time of the accident. The ambulance was responding to a possible dislocated shoulder, which the dispatcher designated as a “Priority 1” run, meaning that the ambulance could proceed through traffic lights with caution, exceed the speed limit, and drive in oncoming lanes of traffic.

Litkewycz indicated that, about 10:06 p.m., while traveling westbound on Jolly, she saw the deceased come from the side of the ambulance and run in front of the vehicle before she had time to stop. Colegrove never saw the deceased run in front of the ambulance. Lansing Police Officer Matthew Suchoski arrived at the scene at 10:30 p.m. to conduct accident measurements. He ultimately concluded that the ambulance driver could not have stopped or swerved to avoid the deceased, because the driver likely had less than 1.5 seconds to react to the situation.

II. Issues on Appeal

The parties in these appeals dispute the liability of the various individuals and entities involved. The pertinent issues are as follows: (1) whether plaintiffs failed to establish a genuine issue of material fact regarding whether Litkewycz negligently operated the city-owned ambulance; (2) whether the trial court erred in granting summary disposition to Fisher on the state law claim of gross negligence; and (3) whether the trial court erred in denying summary disposition to defendants CEI-CMH, Sheehan, and Fisher with respect to plaintiffs’ substantive due process claim under 42 USC § 1983. All issues involve summary disposition motions under MCR 2.116(C)(7) and (10).

III. Standard of Review

This Court reviews motions for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(7) requires the granting of summary disposition if the claim is barred by immunity. *Id.* “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” *Id.* at 120. The Court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by the parties and view this evidence in the light most favorable to the nonmoving party. *Id.* If the evidence fails to create a genuine issue of material fact, the moving party must be granted judgment as a matter of law. *Id.*

IV. Operation of the Ambulance

MCL 691.1407(1) provides that “a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.” Neither party disputes that Lansing’s operation of emergency ambulance services is a governmental function. While the immunity covering government agencies is to be broadly construed, *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000), there are exceptions to this immunity, one of which is the motor vehicle exception as contained in MCL 691.1405:

Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner

In order to defeat a motion for summary disposition based on governmental immunity, a “plaintiff must allege facts giving rise to an exception to governmental immunity.” *Terry v Detroit*, 226 Mich App 418, 428; 573 NW2d 348 (1997). Here, plaintiffs must prove two elements: (1) negligent operation of a motor vehicle by Litkewycz and (2) an injury resulting from that negligent operation. See MCL 691.1405. Plaintiffs have failed to prove the first element.

The standard of care under a negligence claim is “reasonable conduct.” *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004); *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992). MCL 257.603 sets forth the duty of care and reasonable conduct required of drivers of emergency vehicles:

(2) The driver of an authorized emergency vehicle *when responding to an emergency call* . . . may exercise the privileges set forth in this section, subject to the conditions of this section.

(3) The driver of an authorized emergency vehicle may do any of the following:

(c) Exceed the prima facie speed limits so long as he or she *does not endanger life or property*.

(d) Disregard regulations governing direction of movement or turning in a specified direction.

(4) The exemptions granted in this section to an authorized emergency vehicle apply only when the driver of the vehicle while in motion sounds an *audible signal* by bell, siren, air horn, or exhaust whistle . . . and when the vehicle is equipped with at least 1 lighted lamp displaying a *flashing, oscillating, or rotating red or blue light* visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc [Emphasis added.]

Furthermore, MCL 257.653(2) adds that emergency vehicle drivers are not relieved of “the duty to drive with due regard for the safety of persons using the highway.”

Before the driver of an emergency vehicle can exceed the speed limit and violate other traffic laws, he or she must be “responding to an emergency call.” MCL 257.653(2). While plaintiffs question whether a dislocated shoulder is a “true” emergency, the plain language of the statute only requires that the ambulance respond to a call claiming an emergency. Defendant’s evidence shows that the 911 dispatcher made a Priority 1 call to the ambulance regarding a possible dislocated shoulder; thus, the driving privileges of MCL 257.603(3) applied to Litkewycz and the ambulance.

In an attempt to show that Litkewycz drove the ambulance negligently, plaintiffs rely on the affidavit of an expert accident reconstructionist, Richard Sanderson. However, an examination of Sanderson’s conclusions and the evidence he used to reach those conclusions lead to the determination that his evidence is speculative, at best.

“[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to . . . establish[] a genuine issue of material fact.” *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). “Summary disposition is not precluded simply because a party has produced an expert to support its position. The expert’s opinion must be admissible. . . . The facts and data upon which the expert relies in formulating an opinion must be reliable.” *Amorello v Monsanto Corp*, 186 Mich App 324, 331-332; 463 NW2d 487 (1990). Admissibility requires that an expert have adequate “knowledge, skill, experience, training, or education . . .” MRE 702.

In his affidavit, Sanderson concluded the following:

In light of the nature of the ambulance run, the sudden maneuver into the eastbound lane without looking and the comparatively slow speed of the victim, (7 to 8 mph maximum) and the fact that the victim was not traveling fast enough to completely cross in front of the on-coming ambulance to get to the right front corner, it seems most likely that the ambulance made a sudden, last second maneuver toward Mr. Walendzik with an extreme lack of care.

Sanderson also concluded that, if the ambulance swerved, it did so at a speed of 45 to 50 miles an hour. However, if it did not swerve, as Officer Suchoski concluded, the ambulance must have been traveling at 60 miles an hour rather than the 44 to 47 miles an hour estimated by Officer Suchoski.

In reaching his conclusion that the ambulance driver hit the deceased while swerving from the westbound lane to the eastbound lane “without looking” to get around slowed cars, Sanderson uses two main pieces of evidence. The first piece is Michael Murphy’s statement that, while he did not actually see the accident, he thought “at least part of the ambulance was in the eastbound lane.” When Murphy was asked if he saw the ambulance swerve, his response indicated that he only assumed it swerved into the eastbound lane. He stated, “Well, there were cars in the westbound lane, so I believe the ambulance was going around the cars.” The second piece of evidence is a photograph of the damage to the grill of the ambulance, showing that the deceased hit the north side of the ambulance even though he would have traveled into the road

from the south. Based on these two pieces of evidence, Sanderson concluded that Litkewycz, in trying to pass slower moving traffic in the westbound lanes, made a “sudden maneuver *toward* Mr. Walendzik,” “*without looking*,” evidencing “an extreme lack of care.” In our view, Sanderson has produced insufficient factual support for his conclusions, and, therefore, his affidavit is insufficient to create a genuine issue of material fact that the ambulance was operated negligently. See *Amorello*, supra at 332. Additionally, we note that plaintiffs produced no affidavits or depositions detailing Sanderson’s qualifications as an expert accident reconstructionist, calling into question the admissibility of his testimony under MRE 702.

Because plaintiffs have not produced sufficient evidence to create a genuine issue of material fact regarding the negligent operation of the ambulance, the trial court should have granted summary disposition to Lansing under MCR 2.116(C)(7) or (10).

V. Gross Negligence of Fisher

MCL 691.1407(2) details the governmental immunity afforded to government employees like defendant Fisher:

[E]ach officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment . . . if all of the following are met:

(a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a governmental function.

(c) The officer’s, employee’s, member’s, or volunteer’s conduct does not amount to *gross negligence that is the proximate cause of the injury or damage*. [Emphasis added.]

No party disputes that defendant Fisher acted within the scope of her authority or that her employer, CEI-CMH, was a governmental agency exercising a governmental function. Rather, the parties’ dispute concerns whether Fisher acted with gross negligence in failing to keep the deceased from leaving CEI-CMH. Gross negligence is defined as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(7)(a). In *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004), this court expounded on the gross negligence standard in relation to government employees:

Simply alleging that an actor could have done more is insufficient under Michigan law, because, *with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result*. . . . [G]ross negligence . . . suggests . . . almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risk. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that *the actor simply did not care about the safety or welfare of those in his charge*. [Emphasis added.]

With this standard in mind, the issue on appeal is whether plaintiffs presented enough evidence, through affidavits, pleadings, and depositions, to create a genuine issue of material fact regarding whether defendant Fisher acted with gross negligence. *Maiden, supra* at 119-120. We find that plaintiffs did not present sufficient evidence to create an issue of fact.

Plaintiffs' evidence of gross negligence is based entirely on the statements of various doctors who all state the obvious, which is that, based on hindsight, defendant Fisher should have restrained the deceased from leaving CEI-CMH. However, these doctors do not show that Fisher had a willful disregard and did not care about the safety of the deceased. The undisputed facts of the case show that Fisher interviewed the deceased and determined that he needed further mental evaluation by the doctor in attendance, who was busy with an elderly couple. While Fisher had the power to order the restraint of the deceased, she did not feel that he was an imminent danger to himself or others; in her unofficial opinion, he was delusional but not suicidal. None of the deceased's actions during his wait at CEI-CMH would reasonably have lead Fisher to believe he was a danger to himself. The deceased was not agitated and even rested at times, and he frequently went on smoking breaks and returned.

One of plaintiffs' experts argues that Fisher's knowledge of the deceased's propensity that night to step in front of vehicles (e.g., the PACE vehicle) should have led her to conclude that he was a danger to himself. In essence, the expert places on Fisher the duty of predicting, based on one incident of stepping in front of a vehicle for help, that the deceased would eventually step in front of an ambulance. The gross negligence standard places no such duty of prediction on a government employee. We again note that, "with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result" *Tarlea, supra* at 90.

The trial court did not err in granting summary disposition to Fisher with respect to the gross negligence claim.

VI. The 42 USC § 1983 Claim

42 USC § 1983 places civil liability on any person or entity who "under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." deprives a person of his or her constitutional rights. In this case, it is undisputed that CEI-CMH, Sheehan, and Fisher (hereinafter "defendants"), in handling the deceased, operated under color of the Michigan Mental Health Code. However, the key issue is whether defendants deprived the deceased of his constitutional rights.

Plaintiffs allege that defendants were deliberately indifferent to the deceased's mental health needs, depriving him of his Fourteenth Amendment substantive due process rights. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." This Amendment acts as "a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v Winnebago Co Dep't of Social Services*, 489 US 189, 195; 109 S Ct 998; 103 L Ed 2d 249 (1989). Only when a state takes a citizen into custody, depriving him of his liberty, does that state owe an affirmative duty to protect the citizen from harm. *Id.* at 198. For instance, a state violates a prisoner's Eighth and Fourteenth Amendment rights when its employees act with

deliberate indifference to the medical needs of the prisoner. *Estelle v Gamble*, 429 US 97, 104; 97 S Ct 285; 50 L Ed 2d 251 (1976). Deliberate indifference amounts to recklessness or conscious disregard for a substantial risk of serious harm; it requires “a state of mind more blameworthy than negligence.” *Farmer v Brennan*, 511 US 825, 835, 839; 114 S Ct 1970; 128 L Ed 2d 811 (1994). Moreover, involuntarily committed mental patients retain, to some extent, Fourteenth Amendment liberty interests in safety and freedom from bodily restraint while in the custody of the state. *Youngberg v Romeo*, 457 US 307, 319-320; 102 S Ct 2452; 73 L Ed 2d 28 (1982).

As mentioned, the state only has an affirmative duty to protect a citizen when that citizen is in the “custody” of the state through incarceration, institutionalization, or some other form of restraint. *DeShaney*, *supra* at 190; *Simmons v City of Inkster*, 323 F Supp 2d 812, 816 (ED Mich, 2004). The Sixth Circuit has defined “custody” as the “‘intentional application of physical force and show of authority made with the intent of acquiring physical control.’” *Cartwright v City of Marine City*, 336 F 3d 487, 491 (CA 6, 2003), quoting *Ewolski v City of Brunswick*, 287 F 3d 492, 506 (CA 6, 2002).

Without having actual custody of an individual, the other way a state may be liable for violations of an individual’s substantive due process rights is through the state-created danger exception. This exception applies when state officials make “‘affirmative actions [that] directly increase the vulnerability of citizens to danger or otherwise place citizens in harm’s way.’” *Cartwright*, *supra* at 493, quoting *Ewolski*, *supra* at 509.

With regard to the liability of defendant Fisher, plaintiffs faced a two-pronged burden as a result of qualified immunity. Plaintiffs had to prove (1) that Fisher’s actions were unconstitutional and (2) that Fisher should have known at the time that she was violating the deceased’s rights. *Stemler v City of Florence*, 126 F 3d 856, 866 (6th Cir 1997). Plaintiffs clearly failed to establish the first prong, making it unnecessary for us to evaluate the second prong.

Plaintiffs did not produce sufficient evidence proving that Fisher took “custody” of the deceased. Throughout the night, the deceased voluntarily sought mental health treatment. When an officer transported the deceased to CEI-CMH, the deceased was merely in “temporary” protective custody, which “is civil in nature and is not to be construed as an arrest.” MCL 330.1100c(7). There is no evidence that the officer found it necessary to make an application for hospitalization of the deceased under MCL 330.1427. Moreover, the undisputed evidence shows that, while at CEI-CMH, the deceased never exhibited conduct warranting the “‘intentional application of physical force and show of authority made with the intent of acquiring physical control.’” *Cartwright*, *supra* at 491, quoting *Ewolski*, *supra* at 506. It appeared to everyone in contact with the deceased that night that he was voluntarily seeking medical treatment and hospitalization; at no time did a CEI-CMH official need to restrain the deceased or involuntarily

commit him.² The deceased was never in the custody of Fisher, and there is no evidence that she violated his constitutional rights.

Plaintiffs argue that Fisher effectively took “custody” of the deceased when she completed the Petition for Hospitalization form and checked a box indicating that the deceased could “in the near future [] intentionally or unintentionally seriously physically injure self or others” However, Fisher explained that she exaggerated this finding in order to improve the deceased’s chances of being accepted and treated by his home county of Kent. She believed the deceased was delusional, but not suicidal.

There is also no evidence that Fisher’s actions with respect to the deceased qualified as a state-created danger. Plaintiffs fail on the very first element of the exception, which is to prove “an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party.” *Cartwright, supra* at 493. Assuming this element would even apply in a case like this where the victim’s own actions (stepping in front of a moving ambulance) clearly contributed to his death, Fisher never made an affirmative act that created or increased the deceased’s risk of death. Fisher made every effort to get the deceased the medical treatment he voluntarily sought, and, once the deceased left CEI-CMH grounds, Fisher made an affirmative act by calling the police to help the deceased.

With respect to Robert Sheehan, the executive director of CEI-CMH, liability under 42 USC § 1983 is also unavailable. As a supervisory employee, defendant Sheehan is liable under 42 USC § 1983 if his subordinates violated the constitutional rights of others and he “encouraged the specific incident of misconduct or in some other way directly participated in it.” *Lillard v Shelby Co Bd of Educ*, 76 F 3d 716, 727 (CA 6, 1996), quoting *Bellamy v Bradley*, 729 F 2d 416, 421 (CA 6, 1984). Because it is clear that no one at CEI-CMH took “custody” of the deceased or violated his constitutional rights, defendant Sheehan was not liable.

With regard to CEI-CMH, liability under 42 USC § 1983 is similarly unavailable. A governmental entity may be liable if its official policy or custom deprives a person of his or her constitutional rights. *Monell v Dep’t of Social Services of New York*, 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978); *Heflin v Stewart Co, Tennessee*, 958 F 2d 709, 716 (CA 6, 1992). Liability may also lie if a governmental employee applies a policy in an unconstitutional manner as a result of inadequate training provided by the governmental entity. *City of Canton, Ohio v Harris*, 489 US 378, 387; 109 S Ct 1197; 103 L Ed 2d 412 (1989), abrogated on other grounds by *Farmer v Brennan*, 511 US 825; 114 S Ct 1970; 128 L Ed 2d 811 (1994).

² We note that the holding in *Collignon v Milwaukee Co*, 163 F3d 982, 987 (CA 7 1998), provides persuasive authority that 42 USC § 1983 will not support a claim that a government agency is liable for not involuntarily committing an individual to a mental health facility. “Due process protects people from being unlawfully restrained; it provides no right to be restrained, lawfully or otherwise.” *Id.*

Because Fisher did not violate the deceased's constitutional rights, there was simply no evidence that CEI-CMH had a policy that violated the deceased's constitutional rights. See *Rogers v City of Port Huron*, 833 F Supp 1212, 1222 (ED Mich, 1993). Plaintiffs contend that CEI-CMH's policy of trying to get the patient's county of residence (in this case Kent County) to accept the patient for treatment delayed the deceased's access to treatment, violating his constitutional rights. This argument is patently without merit. The deceased was never in the custody of CEI-CMH and there was no evidence of any violation of his constitutional rights.

The trial court should have granted summary disposition to CEI-CMH, Sheehan, and Fisher with respect to the 42 USC § 1983 claim.

In Docket No. 258729, we reverse the trial court's denial of summary disposition to Lansing and affirm the grant of summary disposition to Fisher. In Docket No. 259685, we reverse the trial court's denial of summary disposition to CEI-CMH, Sheehan, and Fisher. This case is remanded for entry of the appropriate orders. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette